92-343 (2)

Supreme Court, U.S.
FILED
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES BURKE SANTOS, Petitioner

V.

MEGUMI LINDSTROM AND UNIFICATION CHURCH OF COLORADO, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

APPENDIX 1

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COLORADO COURT OF APPEALS
September 26, 1991
No. 90CA1563
NOT SELECTED FOR PUBLICATION

James Santos, Plaintiff-Appellant

v.

Megumi Lindstrom, an Holy Spirit Association, a/k/a Unification Church of Colorado,

Defendants-Appellees.

Appeal from the District Court of the City and County of Denver

Honorable Connie L. Peterson, Judge

No. 90CV5699

Division I JUDGEMENT AFFIRMED

Opinion by JUDGE SILVERSTEIN*

Pierce and Marquez, JJ., concur

The Mellon Law Firm, Joseph J. Mellon, John S.L. Sackett, Mary F. Mellon, Denver, Colorado, for Plaintiff-Appellant

In this negligence action, James Santos, plaintiff, appeals from the judgment dismissing his claims against defendants, Megumi Lindstrom and Holy Spirit Association, a/k/a Unification Church. We affirm.

The complaint filed May 24, 1990, alleged that on July 6, 1986, an automobile negligently driven by Lindstrom and owned by Holy Spirit Association collided with a vehicle plaintiff was driving, causing him personal injuries and property damage. Defendants filed a motion to dismiss, asserting that the action was barred by the three-year statute of limitations for actions under the Colorado Auto Accident Reparations Act, §13-80-101(1)(j), C.R.S. (1987 Repl. Vol. 6A) (No-Fault Act).

Plaintiff filed a response opposing the motion, asserting that his cause of action did not accrue until June 13, 1988, the date his medical expenses exceeded the $2,500 threshold provision of the Colorado Auto Accident Reparations Act, §10-4-714(1)(e), C.R.S. (1987 Repl. Vol. 4A). The trial court determined that plaintiff did not dispute, either in the complaint or in the response to defendants' motion, having knowledge of his injury and its cause on the date of the accident. The trial court therefore determined that, pursuant to §13-80-108(1), C.R.S., plaintiff's cause of action accrued on July 6, 1986.

Accordingly, because the complaint was filed more than three years thereafter, the trial court dismissed the action pursuant to Cox v. Jones, 802 p.2d 1125 (Colo. App. 1990) (cert. granted Dec. 24, 1990) and §13-80-101(1)(j), C.R.S. (1987 Repl. Vol. 6A).

I.

Relying on Pistora v. Rendon, 765 P.2d 1089 (Colo. App. 1988), plaintiff contends that the trial court erred in dismissing the action as time-barred because his cause of action did not accrue until June 13, 1988, when his medical expenses reached the $2,500 "threshold" figure set forth in §10-4-714(1)(e), C.R.S. (1987 Repl. Vol. 4A). We disagree.

The General Assembly has declared that a cause of action for personal injury

"shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." Section 13-80-108(1), C.R.S. (1987 Repl. Vol. 6A). Under the construction urged by plaintiff, however, an injured party cannot have knowledge of his "injury" until he knows that his medical expenses have reached the $2,500 threshold, regardless of the time period involved. We decline to hold that the plain and obvious meaning of the term "injury" includes such a condition. See Charnes v. Lobato, 743 P.2d 27 (Colo. 1987).

We find support for this conclusion in the recent opinion of our supreme court in Dove v. Delgado, 808 P.2d 1270 (Colo. 1991).

There, the plaintiff contended that she was unable to file her claim within the requisite limitations period for tort actions because, at the time she was required to file her action, she was unable to assess the extent of her potential future damages. In rejecting this contention, our supreme court held:

> "We fail to see how Dove's uncertainty as to the extent of her damages prevented the filing of her complaint within the limitations period where the fact of injury was known since the date of her accident. The amount of damages is a matter to be determined at trial, and uncertainty as to the proper award of damages is a question for the trier of fact to resolve." (emphasis supplied)

Here, the record supports the conclusion that plaintiff knew or reasonably should have known of the fact of his injury on the date of the accident. Moreover, after his medical expenses reached $2,500 in June 1988, plaintiff still had more than a year in which to bring a timely action. SEE Cox v. Jones, supra. Accordingly, because the action was not commenced until nearly four years after plaintiff knew or reasonably should have known of the fact of his injury, the trial court correctly applied the three-year statute of limitations to bar plaintiff's claims. SEE Dove v. Delgado supra.

With respect to the case relied on by plaintiff, the trial court concluded

that Pistora v. Rendon, supra, was a case narrowly decided on its facts which held that the trial court's dismissal should have been without prejudice. It further concluded that, because there was no statute of limitations issue in Pistora, the decision should not be expanded to hold that the statute of limitations commences to run on the date the threshold is reached. We agree with this conclusion. See Dove v. Delgado, supra.

II.

Plaintiff also contends that the trial court's dismissal should be reversed because the statute of limitations was tolled until his losses exceeded the No-Fault Act of $2,500. Again, we disagree.

"The purpose of a statue of limitations is to promote justice, discourage unnecessary delay, and forestall the prosecution of stale claims." Dove v. Delgado, supra. As the Dove Court stated in upholding the constitutionality of the two-year statute of limitations for tort actions,

> "Indeed, the shorter time period not only compels parties to move their cases through the court system in a more timely manner, but it reduces the possibility that intervening factors will arise to cloud the issues of causation and damages. By forcing parties to use diligence in pursuit of their claims, the two-year limitations period meets the purposes served by the statute of limitations."

Here, under the tolling construction urged by plaintiff, a plaintiff could delay filing his action for any number of years, without limitation, until his medical expenses reached $2,500. We conclude that such a result is contrary to the legislative purposes of discouraging unnecessary delay and forestalling the prosecution of stale claims. Accordingly, we decline to hold that the three-year statute of limitations was tolled until the No-Fault Act threshold was met.

Judgment affirmed.

JUDGE PIERCE and JUDGE MARQUEZ concur.

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 90 CV 5699, Courtroom 9

ORDER

JAMES SANTOS,

Plaintiff,

v.

MEGUMI LINDSTROM, et al.,

Defendants

The Court, having reviewed the Defendants' Motion to Dismiss, filed June 29, 1990, the Plaintiff's Response thereto filed July 3, 1990, and the Defendants' Reply filed July 11, 1990, grants Defendants' Motion To Dismiss.

1. An automobile collision occurred between the parties on July 6, 1986.

2. This matter was filed with the Denver District Court May 24, 1990.

3. Defendant has moved for dismissal based on C.R.S. 13-80-101(j) the three-year statute of limitations under the "Colorado Auto Accident Reparations Act."

4. Defendant contends that Plaintiff had knowledge of the nature of his injury and that the injury was caused by the Defendant on the date of the accident. Defendant then contends she is entitled to a dismissal based on the statute of limitations.

5. Plaintiff does not dispute the knowledge of his injury but takes the

position that the statute of limitations did not commence until the threshold requirements of C.R.S. §10-4-714 were met, citing Pistora v. Rendon, 765 P.2d 1099 (Colo. App. 1988) and Miller, Colorado Personal Injury Practice, §6.20 at p.44.

6. The issue, here, is the effect of §10-4-714 on §13-80-101(j), if any, and if Pistora gives us any assistance with this issue.

7. According to Colorado Personal Injury Practice at §6.20, "Presumably an auto accident injury claim against a person with a 'complying policy' would not start the statute of limitations running until a 'threshold' injury was known." The author then cites Pistora.

8. C.R.S. §10-4-714 defines threshold injury as "death, dismemberment, permanent disability, permanent disfigurement or reasonable need for services having a reasonable value in excess of $2,500.00 and a loss of earnings and earning capacity extending beyond a 52-week period." (Emphasis added.)

9. What does Pistora tell us? In Pistora, the plaintiff's case had been pending for quite some time because the subject motion for summary judgement was filed subsequent to plaintiff's filing of their trial data certificate (presumably, 45 days prior to trial). The plaintiffs' trial data certificate stated that medical expenses were less than $2,500.00.

The defendant filed a motion for summary judgment to which the plaintiff did not respond. The trial court granted summary judgment, dismissing the case with prejudice. The plaintiffs then moved the trial court for reconsideration requesting only that the dismissal be without prejudice. The trial court denied the motion for reconsideration and the case remained dismissed with prejudice. The court of appeals reversed the trial court and held that the proper remedy was dismissal without prejudice and then gave a litany of cases in which trial courts were reversed for an overzealous exercise of discretion.

10. In addition to the holding that the proper remedy for failure to meet the threshold amount of $2,500.00 required by §10-4-714 is not dismissal

with prejudice, the opinion of the court of appeals also includes that "an action such as this cannot be maintained unless medical expenses exceed a threshold requirement of $2,500.00." (765 P.2d at 1089.) It is this phrase which causes the discussion.

11. In speculating what Pistora held we could conclude the following: (1) It was a case narrowly decided on the facts which merely held that the trial court should have granted the plaintiff's request to dismiss without prejudice; (2) failure to meet the threshold requirement tolls the statute of limitations (Undoubtedly, this interpretation is problematic.); and (3) the statute of limitations commences to run when the threshold was reached.

12. It is this Court's opinion that Pistora was a case narrowly decided on its facts which held that the trial court should have granted the plaintiff's request to dismiss without prejudice and that Pistora cannot be expanded to hold that the statute of limitations commences to run on the date the threshold is reached. There was no statute of limitations issue in Pistora.

13. The Colorado Legislature has defined when a cause of action accrues. C.R.S. §13-80-108(1) specifically states:

> A cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence.

14. The Plaintiff does not dispute he was aware of his injury and the cause of the injury on the date of the accident. Section 10-4-714 does not require that the Plaintiff accumulate more than $2,500 before the threshold is met. The statute requires that the Plaintiff have a "reasonable need for services having a reasonable value in excess of $2,500."

15. The Plaintiff's cause of action commenced on the date of the accident July 6, 1986. Plaintiff failed to file suit within three years of that date and therefore Plaintiff's Complaint is dismissed with prejudice.

Accordingly, the Defendants' Motion To Dismiss is Granted.

BEST AVAILABLE COPY

THE COURT OF APPEALS OF THE STATE

OF COLORADO

Case Number 90CA1563

ORDER

JAMES SANTOS V MEGUMI LINDSTROM ET AL

Upon considertation of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including November 25, 1991 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the SUPREME

COURT OF APPEALS
STATE OF COLORADO
filed to be a full, true and correct copy
Date 7-28-92
James G. Benway
Clerk of Court of Appeals
Catherine Cunningh
Deputy Clerk

BY THE COURT:

Silverstein, J.

Pierce, J.

Marquez, J.

DATED: October 24th 1991

SEAL

COPIES MAILED TO
COUNSEL OF RECORD
Tri. Ct. Judge - Tri. Ct. Clerk
AND
ON 7-28-92
BY
COLORADO COURT OF APPEALS

SUPREME COURT, STATE OF COLORADO

Case No. 91SC716

Certiorari to the Colorado Court of Appeals 90CA1563

Denver District Court 90CV5699

ORDER OF COURT

JAMES SANTOS,

Petitioner,

v.

MEGUMI LINDSTROM, and HOLY SPIRIT ASSOCIATION, a/k/a UNIFICATION CHURCH OF COLORADO,

Respondents

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 13, 1992.

cc:

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Supreme Court
State of Colorado
Certified to be a full, true and correct copy
JUL 28 1992
MAC V. DANFORD
Clerk of the Supreme Court
By: Deputy

Court Seal

§ 10-4-714. Limitation on tort actions

(1) No person for whom direct benefit coverage is required by operation of sections 10-4-705 to 10-4-707, or for whom direct benefits would have been payable but for exercise of a deductible option or but for a waiting period or percentage limitation, shall be allowed to recover against an owner, user, or operator of a motor vehicle, or against any person or organization legally responsible for the acts or omissions of such person, for damages for bodily injury caused by a motor vehicle accident, except in those cases in which there has been caused by a motor vehicle accident:

(a) Death;

(b) Dismemberment;

(c) Permanent disability;

(d) Permanent disfigurement;

(e) Reasonable need for services of the type described in section 10-4-706(1)(b) and (1)(c) having a reasonable value in excess of two thousand five hundred dollars. "Reasonable value" as used in this paragraph (e) means the average cost of specific types of services described in section 10-4-706(1)(b) and (1)(c) in the state of Colorado as determined by the commissioner and published not less than once each year. Notwithstanding the provisions of this paragraph (e), no person shall be allowed to recover against an owner, user, or operator of a motor vehicle used in a ride sharing arrangement, as defined in section 10-4-707.5(2), or against any person or organization legally responsible for the acts

or omissions of such person for damages caused by a motor vehicle accident in which such vehicle was involved, if such vehicle was in use at the time of the accident in a ride sharing arrangement, as defined in section 10-4-707.5(2), based on a reasonable need for services of the type described in section 10-4-706(1)(b) and (1)(c) unless such services have a reasonable value in excess of five thousand dollars.

(f) Loss of earnings and loss of earning capacity extending beyond the fifty-two week period provided in section 10-4-706(1)(d) and not compensated by an applicable complying policy.

(2) Nothing in this part 7 shall be construed to preclude recovery against an alleged tort-feasor of benefits provided or economic loss recoverable in excess of

the minimum coverage required in section 10-4-706(1)(b) to (1)(d).

§ 13-80-101. General limitation of actions - three years

(1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within three years after the cause of action accrues, and not thereafter:

(a) All contract actions, including personal contracts and actions under the "Uniform Commercial Code", except section 4-6-111, C.R.S., and except as otherwise provided in section 13-80-103.5;

(b) Repealed by Laws 1986, S.B. 153, § 4.

(c) All actions for fraud, misrepresentation, concealment, or deceit except

those in section 13-80-102(1)(j) or section 13-80-103(1)(f) or (1)(g);

(d) All actions for restraint of trade;

(e) Repealed by Laws 1987, H.B. 1263, § 38.

(f) All actions for breach of trust or breach of fiduciary duty;

(g) All claims under the "Uniform Consumer Credit Code", except section 5-5-202(6), C.R.S.;

(h) All actions of replevin or for taking, detaining, or converting goods or chattels, except as otherwise provided in section 13-80-103.5;

(i) All actions under the "Motor Vehicle Financial Responsibility Act", article 7 of title 42, C.R.S.

(j) All actions under the "Colorado Auto Accident Reparations Act", part 7 of article 4 of title 10, C.R.S.

(k) All actions accruing outside this state if the limitation of actions of the place where the cause of action accrued is greater than that of this state;

(l) All actions of debt under section 40-30-102, C.R.S.;

(m) All actions for recovery of erroneous or excessive refunds of any tax under section 39-21-102, C.R.S.

§ 13-80-108. When a cause of action accrues

(1) A cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence.

(2) A cause of action for wrongful death shall be considered to accrue on the date of death.

(3) A cause of action for fraud, misrepresentation, concealment, or deceit shall be considered to accrue on the date such fraud, misrepresentation, concealment, or deceit is discovered or should have been discovered by the exercise of reasonable diligence.

(4) A cause of action for debt, obligation, money owed, or performance shall be considered to accrue on the date such debt, obligation, money owed, or performance becomes due.

(5) A cause of action for balance due on an open account for goods or services shall accrue at the time of the last item of goods or services proved in such account.

(6) A cause of action for breach of any express or implied contract, agreement, warranty, or trust shall be considered to accrue on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence.

13-80-105.

(1) Notwithstanding any statutory provision to the contrary, all actions against any land surveyor brought to recover damages resulting from any alleged negligent or defective land survey shall be brought within the time provided in section 13-80-101 after the person bringing the action either discovered or in the exercise of reasonable diligence and concern should have discovered the negligence or defect which gave rise to such action, and not thereafter, but in no case shall such and action be brought more than ten years after the completion of the survey upon which such action is based.

COURT OF APPEALS, STATE OF COLORADO

Case No. 90-CA-1563

JAMES SANTOS,

Plaintiff-Appellant,

vs.

MEGUMI LINDSTROM, HOLY SPIRIT ASSOCIATION, a/k/a UNIFICATION CHURCH COLORADO,

Defendants-Appellees.

OPENING BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE DISTRICT COURT
CITY AND COUNTY OF DENVER, STATE OF COLORADO
The Honorable Connie L. Petersen
Trial Court Case No. 90-CV-5699

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1. STATEMENT OF THE ISSUE

Whether the three-year statute of limitations for actions under the Colorado Auto Accident Reparations Act begins running on the date of the underlying auto accident or on the date the Plaintiff meets the threshold requirements for commencing a tort action under the Act.

II. STATEMENT OF THE CASE

A. THE FACTS.

On or about July 6, 1986, Defendant Megumi Lindstrom negligently rearended an automobile being driven by the Plaintiff, James Santos. (R. 1). The accident caused property damage and personal injuries to Mr. Santos. On June 13, 1988, his medical expenses exceeded $2500.00. (Id.)

B. PROCEEDINGS AND DISPOSITION BELOW.

On May 24, 1990, Santos commenced this action against Lindstrom and her employer/principal, the Unification Church of Colorado. (R. 1). The Defendants moved to dismiss on grounds that the action was barred by the three-year statute of limitations for actions under the Colorado Auto Accident Reparations Act. See SS13-80-101(1)(j), 6A C.R.S. (1987). (R. 4). The Denver District Court, by Judge Connie L. Petersen, granted Defendants' motion and dismissed Santos' Complaint with prejudice. (R. 54). Santos timely filed an appeal. (R. 55).

III. SUMMARY OF THE ARGUMENT

A cause of action for a person injured in an automobile accident accrues when that person knows or should

know that his injury meets a statutory threshold for commencing suit.

Generally, a cause of action accrues when a person knows or *should* know, though the exercise of reasonable diligence, that they have suffered a "legal injury." Section 13-80-108(1), 6A C.R.S. (1987). Plaintiff Santos commenced his action within two years of meeting the statutory threshold. Therefore, his action was timely filed. At the least, it is not clear from the Complaint that the Plaintiff-Appellant could prove no set of facts which would entitle him to maintain a cause of action. Therefore, the judgment of the District Court dismissing this action must be reversed and the cause remanded.

IV. ARGUMENT

A. THE DISTRICT COURT ERRONEOUSLY DISMISSED THIS ACTION AS TIME-BARRED.

This case considers when a cause of action accrues to a person who has been injured in an auto accident. In other cases, the Court has held that a cause of action accrues when litigation could first be successfully maintained. Tucker v. Claimants In Re: Death of Gonzales, 37 Colo. App. 252, 546 P.2d 1271, 1274 (1975), cert. denied, Colo. 1976. Essential to a cause of action are some damages which could be recovered by legal action. Doyle v. Linn, 37 Colo. App. 214, 547 P.2d 257, 259 (1975). These principles were adopted by the Colorado Supreme Court when it construed the word "injury" in the former medical malpractice statute

to mean "legal injury," i.e., all of the essential elements of a claim for medical malpractice. See Mastro v. Brodie, 682 P.2d 1162, 1167-68 (Colo. 1984). These principles were most recently reaffirmed by this Court in Flatiron Paving Co. v. Great Southwest Fire Insurance Co., 19 Colo. Law. 2530 (Colo. App. October 25,1990).

Because a person injured in an auto accident must meet a statutory threshold before commencing suit, the cases cited above compel the conclusion that such cause of action does not accrue until the statutory threshold is met. However, the General Assembly enacted in 1986 a statutory definition of when a cause of action accrues, and that statute has not yet been construed by

the appellate courts. The District Court below held that a cause of action for injuries suffered in an auto accident accrues on the date of the accident under the new statute, §13-80-108 (1) , 6A C.R.S. (1987). The issue presented is the correctness of that ruling.

Section 13-80-108(1) provides as follows:

> A cause of action for injury to person, property, reputation, possession, relationship or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence.

The critical issue is the meaning of the word "injury." To find its meaning, this statute must be read with the threshold provisions of the Colorado Auto Accident Reparations Act, which provide in

pertinent part:

> (1) No person for whom direct benefit coverage is required... shall be allowed to recover against an owner, user, or operator of a motor vehicle ... for damages for bodily injury caused by a motor vehicle accident, except in those cases in which there has been caused by a motor vehicle accident:
>
> (a) Death;
> (b) Dismemberment;
> (c) Permanent Disability;
> (d) Permanent Disfigurement;
> (e) Reasonable need for services of a type described in § 10-4-706(1) (b) and (1) (c) {medical and rehabilitation expenses} having a reasonable value in excess of $2,500.00 ....

§10-4-714, 4A C.R.S. (1987). Unless the person injured meets one of the threshold requirements, he cannot maintain an action for damages. Bushnell v. Sapp), 194 Colo. 273, 571 P.2d 1100, 1102 (Colo. 1977); Pistora v. Rendon, 765 P.2d 1089 (Colo. App. 1988).

A three-year statute of limitations

governs actions brought under the Colorado Auto Accident Reparations Act, Section 13-80-101(1)(j) 6A C.R.S. (1987); Cox v. Jones, 19 Colo. Law. 1643 (Colo. App. June 6, 1990), cert. granted, 20 Colo. Law. 406 (Colo. December 24, 1990).[1] Thus, under the District Court's construction of §13-80-108(1), the statute of limitations bars any action for personal injury under the Auto Accident Reparations Act that is commenced more than three years after the auto accident regardless of when the threshold for filing suit is reached.[2]

---

[1] The Supreme Court granted certiorari in Cox v. Jones to review the issue presented by this appeal. See 20 Colo. Law. 406. The Court also granted certiorari on the issue of whether the two-year statute of limitations contained in §13-80-102(1)(c), 6A C.R.S. (1987), governs a negligence action arising from an auto accident, instead of the three-year statute of limitations in §13-80-101(1)(j). Since the action in the instant case was filed within two years after threshold requirement was met, but more than three years after the auto accident, which statute of limitations governs this claim will have no effect on the outcome.

2

The District Court noted that §10-4-714(1)(e) did not require the accumulation of $2,500.00 in medical bills, but rather required the Plaintiff to have "a reasonable need for services in excess of $2,500.00." (R. 54). Since there were no allegations related to when the Plaintiff knew or reasonably should have known of this need, this point does not provide an independent basis for dismissal.

The history of this statute compels the conclusion that the word "injury" still means "legal injury." The legislature was presumably aware of this definition when it enacted §13-80-108(1). The concern in the statute for knowing the cause of the injury further enforces the concept of knowledge of a "legal injury". See Mastro v. Brodie, supra.

Comparing the use of the word "injury" here with its use in the Governmental Immunity Act further elucidates its meaning. When the Governmental Immunity Act was originally adopted, the word "injury" was defined to mean "death, injury to a person, damage to or loss of property, of whatsoever kind, which would be actionable in tort if inflicted by a private person." Section 24-10-103(2), 10 C.R.S. (1982) (emphasis added). Something is actionable of course, only

when a cause of action can be maintained on it. Thus, the General Assembly initially defined "injury" in the Governmental Immunity Act as legal injury.

In 1986, the same year that §13-80-108(1) was enacted, the General Assembly changed the definition of "injury" in the Governmental Immunity Act. Gone from a new definition was the word "actionable." The reason for this change can be gleaned from revisions to the notice requirement in the Governmental Immunity Act. Section 24-10-109 (1) was revised to read as follows:

> Any person claiming to have suffered an injury by a public entity or by an employee thereof ... shall file a written notice as provided in this section within 180 days after the date of the discovery of the injury, regardless of <u>whether the person</u>

> then knew all of the elements of a claim or of a cause of action for such injury....

(emphasis added). The General Assembly clearly intended to use the word "injury" there to mean less than a legal injury. Its intention was made perfectly clear. If the General Assembly intended to alter the meaning of that word for statute of limitations purposes, it would have used the same explicitness as in the Governmental Immunity Act.[3]

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[3] The notice requirements in the Governmental Immunity Act serve different purposes than a statute of limitations. They allow a public entity to make a timely investigation of any alleged injuries, permit quick resolution of meritorious claims and permit government to correct dangerous conditions expeditiously claims and permit government to correct dangerous conditions expeditiously. The special reasons for the notice requirement in the Governmental Immunity Act could be frustrated by allowing persons to wait until all of the legal prerequisites of

Therefore, under the proper construction of § 13-80-108(1), the statute of limitations for a person who has been injured in an auto accident begins to run when he knew or with reasonable diligence should have known that he met one of the threshold conditions to bring the action. Under the Complaint in this case, that date was June 13, 1988. Since the action was filed within two years of that date, the Plaintiff's claim is not subject to dismissal on statute of limitations grounds. The judgment of the District Court to the contrary should be reversed and the matter remanded for further proceedings.

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suit existed before such notice was given.

B. THE STATUTE OF LIMITATIONS SHOULD BE TOLLED UNTIL THE PLAINTIFF KNOWS OR SHOULD KNOW THAT HE MEETS THE LEGAL THRESHOLD FOR FILING SUIT.

Several other jurisdictions have passed on the question presented by this appeal. There is a split of authority among them. Several of those decisions are part of the Trial Court record. (R.pp. 20-51). Each decision rests, of course, on particular statutory provisions and precedents within that jurisdiction. However, the rationale of certain cases are in greater accord than others with principles of Colorado law.

In Bond v. Gallen, 469 A.2d 556, 558 (Pa. 1983), the Supreme Court of Pennsylvania held that a tort action allowed by that state's No Fault Act does not begin to run until the Claimant

knows or, exercising reasonable diligence, should know that the Claimant's medical and/or dental losses exceed the statutory threshold. Accord, Stackhouse v. Schneider, 559 A.2d 306 (D.C. App. 1989).The Court noted the similarity between this rule and the "discovery rule", a long standing exception to tort statutes of limitation. Id. at 558-59. Colorado, like Pennsylvania, recognizes the discovery rule. See Mastro v. Brodie, supra.

Tolling the statute of limitations until a Plaintiff knows or should know that he will attain a statutory threshold to commence suit conforms to the concept of "legal injury." See Horan v. Brown, 148 Mich. App. 464, 384 N.W.2d 805 (1986) (per curiam). The

Horan Court concluded that the statutory prerequisite under Michigan's No Fault Act is an essential element of a claim, without which the Plaintiff cannot proceed. Id. at 806; See also, Mielke v. Waterman, 145 Mich. App. 22, 377 N.W.2d 328 (Mich. App. 1985); But see Gagliardi v. Flack, 180 Mich. App. 62, 446 N.W.2d 858 (Mich. App. 1989). The decisions in Horan and Mielke conform with the long standing Colorado rule that a cause of action accrues when the Plaintiff has suffered "legal injury." See Flat Iron Paving Co. v. Great Southwest Fire Insurance Co., supra.

Perhaps one of the better expressions of this principle appears in a pension rights action from California. In Dillon v. Board of Pension Commissioners, 116 P.2d 37, 39 (Cal.

1941), the California Supreme Court, in an opinion by Justice Traynor, wrote:

> A cause of action accrues when a suit may be maintained thereon, and the statute of limitations therefore begins to run at that time.... Since, however, action by the {pension} board must precede Court proceedings to obtain a pension, a Claimant who has applied to the board, cannot sue for the pension while the claim is under consideration by the board. It is well recognized that the running of the statute of limitations is suspended during any period in which the Plaintiff is legally prevented from taking action to protect his rights.

(Citations omitted). This sensible rule will protect the rights of those persons injured in automobile accidents in Colorado whose right to sue depends on meeting a threshold under the Colorado Auto Accident Reparations Act.

V. CONCLUSION

WHEREFORE, the Plaintiff-Appellant

respectfully requests that the judgment of the District Court be reversed and this cause remanded to the District Court for further proceedings.

Respectfully submitted,

MELLON, HARRIS & COOKSEY, P.C.

BY: _____

John S.L. Sackett, #14288
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511 Sixteenth Street,
Suite 600
Denver, Colorado 80202
(303) 893-1888
ATTORNEYS FOR
PAINTIFF-APPELLANT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this _____ day of February, 1991, a true and correct copy of **OPENING BRIEF OF PLAINTIFF-APPELLANT** was placed in the U. S. Mail, postage prepaid and addressed to:

James Bruce
Attorney at Law
1010 Cherry Tower
950 S. Cherry Street
Denver, CO 80222

_____

Joan M. BOND, Appellee,

V.

Charles B. GALLEN, Appellant.

Supreme Court of Pennsylvania.

Argued Oct. 24, 1983.

Decided Dec. 30, 1983.

Action was instituted for injuries sustained in an automobile collision. The Court of Common Pleas, Civil Division, Delaware County, No. 79-5619, Joseph T. Labrum, Jr., J., granted defendant's motion for judgment on the pleadings, and plaintiff appealed. The Superior Court, No. 1087, Philadelphia, 1980, 292 Pa.Super. 207, 437 A.2d 7, reversed and remanded and defendant appealed. The Supreme Court, No. 19 E.D. Appeal Dkt. 1982,

McDermott, J., held that two-year statute of limitations on tort actions allowed by No-Fault Act does not begin to run until a claimant knows or, exercising reasonable diligence, should know that his or her medical and/or dental expenses exceed threshold specified in section of the Act.

Affirmed and remanded.

Larsen, J., concurred in result.

Roberts, C.J., and Hutchinson, J., dissented.

1. Automobiles 251.18

Although general rule is that actions for personal injury must be brought within two years from date of the injury, general rule must give way within framework of No-Fault Act. 40 P.S. § 1009.101 et seq.

2. Automobiles 251.14

Under section of No-Fault Act pertaining to tort liability, a party does not have a cause of action unless and until medical expenses exceed $750, and except for those with more substantial medical bills, the Act abolishes right of injured parties to recover in tort. 40 P.S. § 1009.301.

3. Limitation of Actions 95(1)

Two-year statute of limitations on tort actions allowed by the No-Fault Act does not begin to run until a claimant knows or, exercising reasonable diligence, should know that his or her medical and/or dental expenses exceed the threshold specified in section of the Act. 40 P.S. § 1009.301(a).

4. Limitation of Actions 95(1)

Plaintiff's cause of action under NoFault Act did not accrue until plaintiff knew she had medical bills which exceeded $750

threshold. 40 P.S. § 1009.301(a).

Peter P. Liebert, III, David McCormick, Philadelphia, for appellant.

Matthew S. Donaldson, Jr., Media, for appellee.

Paul E. Holl, Lansdale, amicus curiae, for Ins. Fed. of Pa.

Before ROBERTS, C.J., and NIX, LARSEN, FLAHERTY, McDERMOTT HUTCHINSON and ZAPPALA, JJ.

OPINION

McDERMOTT, Justice.

This is yet another case requiring an

interpretation of the No-Fault Act.[1] Here the issue is whether the two-year statute of limitations on tort actions allowed by the Act begins to run prior to the claimant knowing that she exceeded the Act's threshold for bringing tort actions.

The facts of this case are rather simple: On February 3, 1977, the appellee was, in-- jured in a car accident, struck from behind by a car driven by the appellant. On April 12, 1979, more than two years later, appellee filed her complaint. There, she stated that it was not until December 2, 1978, when a test indicated that there was pressure on her lower lumbar spine requiring surgery, that she knew that her medical expenses would exceed $750. Until that time, the appellee's medical

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[1] Pennsylvania No-Fault Act Motor Vehicle Insurance Act, Act of July 19, 1974, P.L. 489, No. 176, 40 P.S. § 1009.101 *et seq.*

expenses totalled only $361. It was not until after December 17, 1978, when the appellee underwent surgery, that her expenses in fact exceeded $750.

In an answer to the complaint, the appellant asserted in new matter that the appellee's claim was barred by the statute of limitations. The appellant's motion for judgment on the pleadings was granted by the trial court. Sitting en banc, the Superior Court, 292 Pa.Super. 207, 437 A.2d 7, reversed and remanded,[2] holding that the statute of limitations does not begin to run until the claimant knows or, using reasonable diligence, should have known that the thresholds of section 301(a) of the No-Fault Act had been reached. The appellants brought this appeal,

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[2] Judge Johnson wrote a dissenting opinion in which then President Judge Cercone joined.

arguing that the statute of limitations begins to run on the date of the accident. We disagree, and we affirm the Superior Court's order.

[1] The general rule is that actions for personal injury must be brought within two years from the date of the injury. 42 Pa-C. S.A. § 5524(2).[3] However, the general rule must give way within the framework of the No-Fault Act, since the Act so drastically changed the circumstances under which a person can sue in tort when injured in an automobile accident.

[2] The starting point is Part III of the Act which sets out when a person injured in an automobile accident may bring a cause of action, and when he may not. Section 301 in pertinent part, provides:

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[3] Act of July 9, 1976, P.L. 586, No. 142, § 2, 42 Pa.C.S.A. § 5524.

§ 1009.301 Tort Liability.

(a) Partial abolition. Tort liability is abolished with respect to any injury that takes place in this State in accordance with the provisions of this act if such injury arises out of the maintenance or use of a motor vehicle, except that ...

(5) A person remains liable for damages for non-economic detriment if the accident results in:

(A) death or serious and permanent injury; or

(B) the reasonable value of reasonable and necessary medical and dental services, including prosthetic devices and necessary ambulance, hospital and professional nursing expenses incurred in the diagnosis, care and recovery of the victim, exclusive of

> diagnostic xray costs and rehabilitation costs in excess of one hundred dollars ($100) is in excess of seven hundred fifty dollars ($750) ....

40 P.S. § 1009.301. The clear language of the Act states that a party does not have a cause of action *unless and until* medical expenses exceed $750. Except for those with more substantial medical bills, the Act abolishes "the *right* of those injured parties to recover in tort." *Singer v. Sheppard, 464* Pa. 387, 397, 346 A.2d 897, 902-903 (1975).

In its opinion, the Superior Court specifically overruled one of its own cases, Don*nelly v. DeBourke,* 280 Pa.Super. 486, 421 A.2d 826 (1980). The Superior Court reasoned: To say, as Donnelly did, that the statute of limitations starts to run from the date of the accident, even when none of the No-Fault Act's thresholds has been reached, is to say that

the statute starts to run from a date on which, and even though, the cause of action did not exist. Id., 292 Pa.Super. at 211, 437 A.2d at 9. This Catch-22 should not be allowed to stand.[4]

[3] We hold that the two-year statute of limitations on tort actions allowed by the

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[4] Dramatizing its point, the court hypothesized a dialogue between a trial judge, forced to follow the old rule, and a claimant:

> Suppose the accident was on January 1, 1978, buth the $750 threshold was not reached until February 1, 1980. Judge: "your claim is barred because the statute of limitations started to run on January 1, 1978." Claimant: "But under *Singer* I didn't have any cause of action on January 1, 1978. In fact, I didn't get a cause of action until February 1, 1980. By then, according to you, the statute has already run." Judge: "That's true, and it's too bad. What you should have done is, before the statute had run, file a claim saying that although you had no cause of action, because the $750 threshold hadn't been reached, maybe you would have one, because maybe the threshold would be reached. That way you would have protected yourself."

292 Pa.Super at 211, 437 A.2d at 9.

No-Fault Act does not begin to run until the claimant knows or, exercising reasonable diligence, should know that the claimant's medical and/or dental losses exceed a threshold specified in Section 301(a) of the Act.

[4] This rule is in harmony with the general statutory rule for computing periods of limitation, which states:

> The time within which a matter must be commenced under this chapter shall be computed, except as otherwise provided by subsection (b) or by any other provision of this chapter, *from the time the cause of action accrued,* the criminal offense was committed or the right of appeal arose.,

42 Pa.C.S.A. § 5502(a) (Emphasis supplied.).[5]

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[5] Act of July 9, 1976, P.L. 586, No. 142, § 2, 42 Pa.C.S.A. § 5502.

Here, the cause of action did not accrue under the No-Fault Act until the appellee knew she had medical bills which exceeded the $750 threshold.

Such a "discovery rule" would not be foreign to the law in this area. A long-standing exception to the tort statute of limitations allows a plaintiff to bring an action when the injury sustained was not physically ascertainable at the time it was inflicted. The statute does not begin to run in such a case until the potential plaintiff learns, or by the exercise of reasonable diligence could have learned of the tortious conduct. E.g., *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959). (Where a surgeon left a sponge in a patient's abdomen during an operation, undiscovered for nine years.)

Moreover, to enforce a rigid statute of limitations in this case would run counter to

the intentions of the legislature in passing the No-Fault Act. A contrary holding would force claimants to file precautionary, even spurious complaints in order to protect their legal rights if it would be at all conceivable that their medical expenses might exceed the $750 threshold of section 301(a)(5)(B).[6]

The purpose of the Act was to "establish at reasonable cost to the purchaser of insurance, a Statewide system of prompt and adequate basic loss benefits for motor vehicle accident victims and the survivors of deceased victims." 40 P.S. § 1009.102(b). Curbing litigation in cases with comparatively low medical expenses was one method used in the Act to achieve the overall legislative goal of cheaper automobile insurance. To accept

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[6] This result would also be incompatible with the fact-pleading policy of Pa.R.Civ.Pro. 1019(a).

appellant's position would have the effect of encouraging rather than inhibiting such litigation.

Our holding is wholly consistent with this Court's recent decision in *Murphy v. Prudential Property and Casualty Insurance Company,* -- Pa. --, 469 A.2d 1378 (1983). There, we held that a claim ant seeking to recover the cost of purportedly covered services under section 10 is required to bring suit within two years of the date that the claimant *knew or should have known that medical services rendered were necessitated by the automobile accident*, not within two years of the date of the accident. Here, in the same vein, we hold that the statute does not begin to run until the claimant knows or show know that a threshold under section 301(a) has been reached, in other words, until the claimant has a cognizable cause of action

under the Act.

We are sympathetic to the appellant's argument that the result we reach today may present a difficult situation in a case where the threshold is not reached until many years after an accident, giving a defendant problems of proof.[7] However, this, as the Superior Court noted, will be the rare case and cannot solely advance a holding in favor of a rigid statute of limitations.

Thus, on remand, if it is found that the appellee failed to file this action within two years after she knew or should have known, exercising due diligence, that the thresholds of section 301(a) had been surpassed, the

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[7] We note that the provision in section 106 is not a statute of repose applicable to tort actions allowed by Article III of the No-Fault Act. *See Murphy v. Prudential Property and Casualty Insurance Company, supra*. The promulgation of such a statute would be within the province of the legislature.

action should be held time barred. Otherwise, the litigation should be allowed to proceed.

The order of the Superior Court is affirmed and the case is remanded to the trial court for further proceedings consistent with this opinion.

LARSEN, J., concurs in the result.

ROBERTS, C.J., and HUTCHINSON, J., note their dissent.

Maureen L. DOVE, Plaintiff-Appellant,

v.

Laura L. DELGADO,
Defendant-Appellee.

No. 90SA307.

Supreme Court of Colorado,
En Banc.

April 15, 1991

Plaintiff driver brought suit seeking damages for injuries sustained in collision with defendant's vehicle. This District Court, City and County of Denver, J. Stephen Phillips, J., granted defendant's motion for summary judgment. Plaintiff appealed, and appeal was transferred. The Supreme Court, Vollack, J., held that: (1) two-year statute of limitations for negligence action did not violate due process, equal protection guarantees or state equal justice provision, and (2) defendant was not estopped to raise statute of limitations

as a defense.

Affirmed.

1. Appeal and Error 169

Generally, issues not presented in trial court are deemed waived and cannot be raised on appeal.

2. Constitutional Law 48(1)

Stature is presumed to be constitutional.

3. Constitutional Law 48(3)

Burden is on party attacking statute to establish its unconstitutionality beyond reasonable doubt.

4. Constitutional Law 308

Limitation of Actions 4(2)

Statute of limitations does not violate due process unless time fixed is manifestly so limited as to amount to denial of justice. West's C.R.S.A. Const. Art. 2, § 25; U.S. C.A.

Const.Amends. 5, 14.

5. Constitutional Law 308

Limitation of Actions 4(2)

Two-year statute of limitations for filing negligence action was not so unreasonably short as to deny due process, despite plaintiff's contention that period did not allow her to ascertain extent of her damages from automobile collision. West's C.R.S.A. § 13-80-102(1)(a); West's C.R.S.A. Const. Art. 2, § 25; U.S.C.A. Const. Amends. 5, 14.

6. Constitutional Law 213.1(2)

For purpose of analysis of equal protection claim under State Constitution, where legislature enactment impacts on fundamental right or creates suspect classification, state has burden of establishing that statute is necessarily related to compelling

governmental interest. West's C.R.S.A. Const. Art. 2, § 25.

7. Constitutional Law 213.1(2)

In the absence of statutory infringement on fundamental right or creation of suspect class, classes of persons may be treated differently without violating equal protection guarantees if statutory classification has some reasonable basis in fact and bears rational relationship to legitimate state purpose. West's C.R.S.A. Const. Art. 2, § 25, U.S.C.A. Const.Amend. 14.

8. Constitutional Law 213.1(2)

Party challenging statutory classification on equal protection ground bears burden of proving beyond reasonable doubt that statutory classification is unreasonable or, if reasonable, is unrelated to any legitimate governmental objective. West's C.R.S.A. Const. Art.

2, § 25; U.S.C.A. Const.Amend 14.

9. Constitutional Law 213.1(1)

Right to recover damages in tort is not a fundamental right such as would invoke strict-scrutiny test under equal protection analysis. West's C.R.S.A. Const. Art. 2, § 25; U.S.C.A. Const.Amend. 14.

10. Constitutional Law 55

It is within Legislature's domain to amend statutes of limitations to shorten or lengthen time after which certain actions shall be brought.

11. Constitutional Law 249(3)

Limitation of Actions 4(2)

Two-year statute of limitations for negligence actions is reasonably related to legitimate governmental purposes and does not violate equal protection guarantees. West's C.R.S.A. § 13-80-102(1)(a); West's C.R.S.A. Const. Art. 2,

§ 25; U.S.C.A. Const.Amend. 14.

12. Constitutional Law 249(3)

Limitation of Actions 4(2)

Two year statutory limitations for negligence actions does not violate state equal justice provision. West's C.R.S.A. § 13-80-102(1)(a); West's C.R.S.A. Const. Art. 2, § 6.

13. Constitutional Law 209

State equal justice provision merely provides that if right accrues under the law, court must be available to effectuate that right. West's C.R.S.A. Const. Art. 2, § 25.

14. Estoppel 52(6)

Doctrine of estoppel is not favored, and will be applied only when all elements are clearly shown.

15. Estoppel 52.15

In order to apply estoppel, party to be estopped must know the facts; this

party must also intend that her conduct be acted on or must so act that party asserting estoppel has right to believe other party's conduct is so intended; party asserting estoppel must be ignorant of true facts; and party asserting estoppel must rely on other party's conduct to her injury.

16. Limitation of Actions 13

Plaintiff's reliance on settlement discussions with defendant's insurer was an unreasonable justification for failing to file suit within statute of limitations, and therefore defendant was not estopped from raising statute as a defense. West's C.R.S.A. § 13-80-102(1)(a).

Malman & Malman, P.C., Jerome S. Malman, Denver, for plaintiff-appellant.

Creamer and Seaman, P.C., Thomas J. Seaman and Thomas J. Jirak, Denver, for defendant-appellee.

Justice VOLLACK delivered the Opinion of the Court.

The plaintiff, Maureen L. Dove (Dove), appeals the trial court's order granting summary judgment in favor of defendant, Laura L. Delgado (Delgado). We Affirm.

I.

On January 27, 1987, an automobile accident occurred between Dove and Delgado, resulting in injuries to Dove. Soon after the accident, Dove notified Delgado and Delgado's insurer of her injuries and claim.

On March 23, 1989, Dove filed this action in the District Court for the City and County of Denver. In her complaint,

she alleged that Delgado "negligently and carelessly drove a vehicle into an automobile driven by the plaintiff." Dove further claimed that she sustained serious injuries as a direct and proximate result of Delgado's negligence, and that her damages exceeded the threshold amount of $2,500 as required under section 10-4-714(1)(e), 4A C.R.S. (1987), of the Colorado Auto Accident Reparations Act.

Delgado answered, citing the two-year statute of limitations under section 13-80-102(1)(a), 6A C.R.S. (1987), as a bar to Dove's negligence claim. On May 23, 1989, Delgado filed a motion for summary judgment, seeking dismissal of Dove's tort action because more than two years had elapsed between the date of the accident and the filing of the lawsuit in violation of section 13-80-102(1)(a). In

her response to Delgado's motion for summary judgment, Dove argued that section 13-80-102(1)(a) was unconstitutional because it violated due process and equal protection of the laws. Dove further argued that Delgado must be equitably estopped from asserting section 13-80-102(1)(a) as a bar to her cause of action.

The trial court granted the defendant's motion for summary judgment, finding that the case had not been filed within the two-year statute of limitations and that section 13-80-102(1)(a) was not unconstitutional. Dove appealed to the court of appeals, and based on the constitutional issues raised, the appeal was transferred to this court pursuant to sections 13-4-

102(1)(b)[1] and 13-4-110(1)(a),[2] 6A C.R.S. (1987).

II.

[1] On appeal, Dove contends that section 13-80-102(1)(a) violates due process; denies her equal protection under the law and violates article II, section 6, of the Colorado Constitution.

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[1] **13-4-102. Jurisdiction.** (1) Any provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts,..., except in:

(b) Cases in which the constitutionality of a statute, a municipal charter provision, or an ordinance is in question[.]

[2] **13-4-110. Determination of jurisdiction--transfer of cases.** (1)(a) When a party in interest alleges, or the court is of the opinion, that a case before the court of appeals is not properly within the jurisdiction of the court of appeals, the court of appeals shall refer the case to the supreme court. The supreme court shall decide the question of jurisdiction in a summary manner, and its determination shall be conclusive.

Dove further argues that Delgado should be equitably estopped from raising the statute of limitations as a defense.[3]

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[3] After the parties had submitted then appellate briefs in the present action, the Colorado Court of Appeals issued an opinion in *Cox v. Jones*, 802 P2d 1124 (Colo.App.1990), on June 7, 1990, in which the court held that the three-year statute of limitations under § 13-80-101(1)(j), 6A C.R.S. (1987), governed the plaintiff's tort action arising from an automobile accident. Section 13-80-101(1)(j) provides that "[a]ll actions under the 'Colorado Auto Accident Reparations Act', part 7 of article 4 of title 10, C.R.S." shall be file within three years after the cause of action accrues.

Following the issuance of the *Cox* opinion, Dove filed a motion requesting permission to file a supplemental brief addressing the applicability of § 13-80-101(1)(j) to her tort action. This court granted the motion on November 2, 1990. Both parties filed supplemental briefs on November 29, 1990. On December 24, 1990, we granted the petition for writ of certiorari in *Cox* to review whether a plaintiff filing a general negligence claim may use the three-year statute of limitations contained in the Colorado Auto Accident Reparations Act, or whether the plaintiff must use the two-year statute of limitations for tort actions contained in § 13-80-102(1)(a).

Generally, issues not presented in the trial court are deemed waived and

[2,3] The principal question for our review is whether section 13-80-102(1)(a) is constitutional. That statute provides that tort actions, including actions for negligence, "shall be commenced within two years after the cause of action accrues, and not thereafter." Moreover, section 13-80-108(1) provides that a cause of action for personal injury "shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." We note at the outset that a

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cannot be raised on appeal. *E.g., Paine, Webber, Jackson & Curtis, Inv. v. Adams,* 718 P.2d 508, 509 (Colo.1986); *Christensen v. Hoover,* 643 P.2d 525, 531 (Colo. 1982); Matthews v. *Tri-County Water Conservancy Dist.,* 200 Colo. 202, 206, 613 P.2d 889, 892 (1980); *City of Aurora v. Aurora Firefighters' Protective Ass'n,* 193 Colo. 437, 441, 566 P.2d 1356, 1358 (1977). Because Dove failed to argue at the trial level the applicability of § 13-80-101(1)(j), we decline to consider that issue on appeal.

statute is presumed to be constitutional, and the burden is on the party attacking the statute to establish is unconstitutionality beyond a reasonable doubt. *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 214 (Colo. 1984); *People in the Interest of C.M.*, 630 P.2d 593, 594 (Colo.1981).

[4,5] Dove first argues that section 13-80-102(1)(a) is so unreasonably short as to deny due process. U.S. Const. amends V and XIV; Colo. Const. art. II, § 25. The general rule is that a statute of limitations does not violate due process "unless the time fixed by the statute is manifestly so limited as to amount to a denial of justice." *Oberst v. Mays,* 148 Colo. 285, 292, 365 P.2d 902, 905 (1961). "The legislature is the primary judge of whether the time allowed by a statute is

reasonable." *Id.; see also Mishek v. Stanton,* 200 Colo. 514, 518, 616 P.2d 135, 138, (1980). Under the facts presented, we do not find that the two-year limitation for filing a negligence action is so unreasonably short as to amount to a denial of justice.

Dove does not dispute that her cause of action accrued on January 27, 1987, the date of the accident. Essentially, she asserts that she was unable to file her claim within the requisite two-year limitations period for tort actions because she had not, in her words, reached "maximum medical improvement" at the time she was required to file her action and was therefore unable to assess with accuracy at that time the extent of her potential future damages. We consider Dove's argument to be without merit.

Dove does not argue that she was unable to ascertain whether she had sustained *any* damage as a result of the accident. In fact, she asserts in her complaint that she incurred damages in excess of $2,500. We fail to see how Dove's uncertainty as to the extent of her damages prevented the filing of her complaint within the two-year limitations period where the fact of injury was known since the date of her accident. The amount of damages is a matter to be determined at trial, and uncertainty as to the proper award of damages is a question for the trier of fact to resolve. *See Peterson v. Colorado Potato Flake & Mfg. Co.*, 164 Colo. 304, 309-10, 435 P.2d 237, 239 (1967). It is the plaintiff's responsibility to gather sufficient evidence from which the trier of fact can calculate a reasonable award

of damages. Dove's failure to reach "maximum medical improvement" is a damages problem to be resolved at trial and in no way affected her ability to file a complaint within the two-year limitations period when she admittedly knew of her injuries since the date of the accident. We therefore hold that section 13-80-102(1)(a) is not unreasonably short so as to violate due process.

B.

Dove next contends that section 13-80-102(1)(a) violates her right to equal protection of the law. U.S. Const. amend XIV; Colo. Const. art II, § 25. She argues that the applicable statute of limitations was shortened from six years to two years only eight months prior to her accident; therefore, by virtue of the date on which her accident occurred, Dove

became a member of a class of individuals burdened by the shorter limitations period. We find no merit in this constitutional challenge.

[6-8] For the purposes of equal protection analysis in Colorado, where a legislative enactment impacts on a fundamental right or creates a suspect classification, the state has the burden of establishing that the statute is necessarily related to a compelling governmental interest. *Austin v. Litvak*, 682 P.2d 41, 49 (Colo.1984); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1015, (Colo. 1982). In the absence of a statutory infringement on a fundamental right or creation of a suspect class, classes of persons may be treated differently without violating equal protection guarantees if the statutory classification has some

reasonable basis in fact and bears a rational relationship to a legitimate state purpose. The party challenging the statutory classification bears the burden of proving beyond a reasonable doubt that the statutory classification is unreasonable or, if reasonable, is unrelated to any legitimate governmental objective. *Persichini v. Brad Ragan, Inc.*, 735 P.2d 168, 174-75, (Colo.1987); *Lee v. Colorado Dep't of Health*, 718 P.2d 221, 227 (Colo.1986).

[9] The creation of a suspect class is not involved here, and contrary to Dove's assertions, the right to recover damages in tort is not a fundamental right. *Austin*, 682 P.2d at 49-50. We therefore reject the strict scrutiny test and apply instead the rational basis test.

[10,11] In essence, Dove argues

that it is unconstitutional for the legislature ever to reduce a statute of limitations since such an amendment would create a class of persons who would no longer be affected by the repealed statute. It is, however, clearly within the legislature's domain to amend statutes of limitations to shorten or lengthen the time after which certain actions shall not be brought. *Edelstein v. Carlile,* 33 Colo. 54, 57, 78 P. 680, 681 (1904). Moreover, as previously stated, it is for the legislature to determine whether the time allowed by a statute is reasonable. *Mishek v. Stanton,* 200 Colo. 514, 518, 616 P.2d 135, 138, (1980); *Oberst v. Mays,* 148 Colo. 285, 292, 365, P.2d 902, 905 (1961). The purpose of a statute of limitations is to promote justice, discourage unnecessary delay, and

forestall the prosecution of stale claims. *Colorado State Bd. of Medical Examiners v. Jorgensen,* 198 Colo. 275, 279, 599, P.2d 869, 872 (1979). In our view, the two-year limitations period under section 13-80-102(1)(a) is reasonably related to these legitimate governmental purposes. Indeed, the shorter time period not only compels parties to move their cases through the court system in a more timely manner, but it reduces the possibility that intervening factors will arise to cloud the issues of causation and damages. By forcing parties to use diligence in pursuit of their claims, the two-year limitations period meets the purposes served by statutes of limitations. Dove, in our view, has failed to demonstrate that the two-year period is unreasonable. We therefore find that section 13-80-

102(1)(a) does not violate equal protection guarantees.

C.

[12,13] Dove next contends that section 13-80-102(1)(a) deprives her of access to the courts in violation of article II, section 6, of the Colorado Constitution, which provides that "[c]ourts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character." We hold that section 13-80-102(1)(a) does not violate the equal justice provision. That provision merely provides that if a right does accrue under the law, the courts must be available to effectuate that right. *O'Quinn v. Walt Disney Prods.*, 177 Colo. 190, 195, 493 P.2d 344, 346, (1972); *Goldberg v. Musim,* 162 Colo. 461, 469, 427 P.2d 698, 703 (1967); *Vogts v.*

Guerrette, 142 Colo. 527, 532, 351 P.2d 851, 854 (1960). Dove was not denied access to the courts; rather, she failed to pursue her vested right in a timely manner. We therefore refuse to invalidate the statute on this basis.

D.

Finally, Dove argues that Delgado should be equitably estopped from raising the statute of limitations as a defense. Dove maintains that, while the limitations period was running, Delgado's insurer communicated a desire to settle Dove's claim and that these settlement discussions led Dove to believe that litigation would be unnecessary.

[14,15] The doctrine of estoppel is not favored, *University of Colorado v. Silverman*, 192 Colo. 75, 79, 555 P.2d 1155, 1158 (1976), and will be applied only when all of the elements

constituting an estoppel are clearly shown. *Susman v. Exchange Nat'l Bank,* 117 Colo. 12, 15, 183 P.2d 571, 573 (1947). There are four basic elements to an estoppel; (1) The party to be estopped must know the facts; (2) this party also must intend that her conduct be acted on or must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting the estoppel must rely on the other party's conduct to her injury. *Department of Health v. Donahue,* 690 P.2d 243, 247 (Colo.1984).

[16] Dove has wholly failed to demonstrate how each of these elements applies in the present case. Moreover, we consider Dove's reliance on settlement

discussions with Delgado's insurer to be an unreasonable justification for failing to file within the requisite period of time. *See Silverman,* 192 Colo. at 79, 555 P.2d at 1158. We therefore reject Dove's contention that Delgado must be estopped from raising the statute of limitations as a defense.

Judgment affirmed.

James P. DOYLE and Florene A. DOYLE
Plaintiffs-Appellants,

v.

Kurt O. LINN, Defendant-Appellee

No. 75-131.

Colorado Court of Appeals,
Div. III

December 18, 1975.

Rehearing Denied January 8, 1976.

Selected for Official Publication.

Landowners brought negligence action against surveyor of their land for damages resulting from removal of their home from property surveyed and subsequently determined to belong to government. The District Court, Jefferson County, Roscoe Pile, J., dismissed action as barred by statutes of limitations, and landowners appealed. The Court of Appeals, Silverstein, C. J., held that statute of limitations did not begin to run until adverse claim of government was determined

to be valid and landowners were found to be trespassers.

Reversed and remanded.

1. **Limitation of Actions 44(1)**

Knowledge of government's hostile claim against landowners' property started running of limitation statute against any claim for relief which landowners might have had against government. C.R.S. '73, 13-80-110.

2. **Negligence 119(1)**

In order to recover on claim based on negligence, plaintiff must prove that he suffered damage as proximate result of negligence of defendant.

3. **Negligence 103**

Without damage there is no cause of action on claim based on negligence.

4. **Limitation of Actions 44(2)**

Mere assertion of claim of adverse title does not in and of itself constitute damage for purposes of initiating running of statute of limitations. C.R.S. '73, 13-80-110.

5. **Limitation of Actions 43**

Before statute of limitations begins to run there must be some damage which would entitle plaintiff to maintain cause of action. C.R.S. '73, 13-80-110.

6. **Limitation of Actions 65(2)**

Statute of limitations did not begin to run against negligence action brought by landowners against surveyor of their land until adverse claim of government on land improperly surveyed and believed to belong to landowners was determined to be valid and landowners were found to be trespassers. C.R.S. '73, 13-80-110.

Richeson & McCain, Robert C. McCain, Denver, for plaintiffs-appellants.

Albert B. Dawkins, Denver, for defendant-appellee.

SILVERSTEIN, Chief Judge.

James and Florence Doyle sought recovery of damages resulting from an allegedly negligent survey made by defendant, Kurt O. Linn. Following a trial to the court, it found that the defendant was negligent and that plaintiffs had been substantially damaged as a result of such negligence. However, the court dismissed the action on the ground that the action was barred by the operation of two statutes of limitations, §§ 13-80-110 and 13-80-127, C.R.S. 1973, and plaintiffs appeal that dismissal. Appellee has confessed that § 13-80-127, 1973, is inapplicable

because the claim for relief arose prior to June 1, 1969, the effective date of that statute. Colo. Sess. Laws 1969, ch. 221, 87-1-28, at 697. See Greene v. Green Acres Construction Co., Colo. App., 543 P.2d 108 (announced September 23, 1975). Therefore the sole issue before this court is whether the action was barred by § 13-80-110, C.R.S. 1973. We hold that it was not and reverse the judgment.

In 1960 the Doyles engaged Linn to prepare a boundary survey of a parcel of mountain property that they were considering buying. Linn knew that the Doyles had selected a site for a home they proposed to build and would buy the property if the site was actually within the plot's boundaries. In September 1960 Linn surveyed and staked the boundaries, and delivered a certified plat to the

Doyles. According to this survey, the desired homesite was within the boundaries of the plot. In reliance on the survey, the Doyles bought the land and began building their house in November 1960. The house was not completed until 1970.

The land adjacent to the Doyle plot on the north is owned by the United States, being part of the Pike National Forest. In 1964 government agents began negotiating with the Doyles for permission to widen an access road to the National Forest, which road crossed the Doyle land. During the discussions, the agents advised the Doyles that there was a possibility that their house was on government land. In November 1964 Bureau of Land Management (B.L.M.) began a "dependent survey" of the boundary line.

The survey was completed in June 1965, and was officially accepted and approved by the B.L.M. on February 1, 1968. According to this survey the Doyle house was on government land.

In October 1968 the United States sued the Doyles in the U.S. District Court for trespass, and obtained a judgment which gave the Doyles 90 days to remove the house. The judgment was affirmed, on appeal, on November 6, 1972. United States v. Doyle, 468 F.2d 633 (10th Cir.). Following this affirmance, the Doyles moved the house onto their own land. The cost of this removal constituted the bulk of the damages sought in the present action, which was commenced on January 21, 1973. All of the above facts are undisputed.

The trial court found that, "plaintiffs suffered $14,721.46 loss and damages, and this loss and damages were proximately caused by defendant's negligence." On disputed evidence the court further found that on completion of the survey in 1965 the government advised the Doyles that their house was, in fact, on government land. The court concluded that the six year statute of limitations, § 13-80-110, C.R.S. 1973, began to run in 1965 the date of the notice to the Doyles of the government's claim.

The Doyles first claim that there is insufficient evidence to support the finding that they were advised of the government's claim in 1965. The record reveals substantial evidence before the trial court to support that finding, and accordingly, it will not be disturbed on review. Thiele v. Colorado, 30 Colo.

App. 491, 495 P.2d 558. However that finding of fact is not dispositive of the legal issue presented here.

Appellants also contend that the six year statute of limitations did not begin to run until the final determination of their litigation with the government in 1972. We agree.

As was stated in Patterson v. Ft. Lyon Canal Co., 36 Colo. 175, 84 P. 807, "[t]he statute of limitations begins to run from the time when the plaintiff's cause of action accrues. . . . This rule is never questioned, but the difficulty lies in determining when the cause of action is to be deemed as having accued".

[1] Although knowledge of the government's hostile claim started the running of the limitations statute

against any claim for relief which the Doyles might have had against the government, see Wood v. Henley, 88 Cal. App. 441, 263 P. 870, we are here concerned only with the question of when the claim for relief against Linn, on negligence, arose.

[2,3] In order to recover on a claim based on negligence, a plaintiff must prove that he suffered damage as a proximate result of the negligence of the defendant. Hoover v. Shott, 68 Colo. 385, 189 P. 848. Without damage there is no cause of action. Roessler v. O'Brien, 119 Colo. 222, 201 P.2d 901.

[4,5] The mere assertion of a claim of adverse title does not in and of itself constitute damage. See Zimmerman v. Hinderlider, 105 Colo. 340, 97 P.2d 443. Before the statute of limitations begins

to run there "[must] be some damage which would entitle plaintiff to maintain a cause of action." Housing Authority v. Leo A. Daly Co., Colo. App., 533 P.2d 937. As was stated in DeCaire v. Public Service Co., 173 Colo. 402, 479 P.2d 964:

> "Injury or damage to the person complaining is an essential element of actionable negligence. The plaintiffs could not have filed their suit predicated solely on defendant's negligent act. There must also be injury or damage. Negligence as used in the statute of limitations means the negligent act or acts which results in and gives rise to the ... claim. In other words, until the claimant has been injured or damaged by the alleged negligence, the statute of limitations does not commence to run."

[6] Here plaintiffs suffered no damages until the adverse claim of the government was determined to be valid and plaintiffs were found to be trespassers, with the consequent damages resulting from their being required to remove their house from government land. The statute of limitations did not begin to run until the judgment became final in 1972.

The judgment of the trial court is reversed and the cause is remanded with direction to enter judgment on favor of plaintiffs for the amount of loss and damages as set forth in the decrees heretofore entered by the trial court.

PIERCE and VanCISE, JJ., concur.